Supreme Court, U.S.
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No. 02-1186

In The

Supreme Court of the United States

GUIDO A. PRONSOLINO AND BETTY J. PRONSOLINO, AS TRUSTEES FOR GUIDO A. PRONSOLINO AND BETTY J. PRONSOLINO TRUST, *ET AL.*,

Petitioners,

v.

WAYNE NASTRI, REGIONAL ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY REGION 9, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

None of the Respondents has a parent corporation or stock owned by a publicly traded company.

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I. INTRODUCTION

Defendants-Intervenors-Appellees Pacific Coast Federation of Fishermen's Associations, *et al.* ("PCFFA") opposes the petition for writ of certiorari. This case does not present any reason why a writ of certiorari should be granted. Petitioners attempt to characterize their disagreement with the unanimous ruling of the Court of Appeals in terms of supposed conflicts with this Court's rulings. In fact, however, their argument is nothing more than a series of contentions that the Court of Appeals did not properly apply this Court's precedents. As we show below, that contention is incorrect. But even if it were true, as Supreme Court Rule 10 instructs, "A petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."

II. EPA'S INTERPRETATION OF THE CLEAN WATER ACT IS ENTITLED TOP DEFERENCE BY THE COURTS

Petitioners contend (pp. 7-14) that the Court of Appeals' analysis of whether EPA's regulations are entitled to *Chevron* deference is flawed, claiming that the Ninth Circuit "got it precisely backwards" because it should have discussed whether the statutory language is ambiguous before determining that deference was appropriate. As we show below, the Ninth Circuit opinion addressed the ambiguity issue in great detail. Petitioners' complaint, then, is reduced to a claim that the order in which the opinion discussed the *Chevron* factors is incorrect. Such a claim hardly warrants the attention of this Court.

In a case cited by Petitioners (p. 7) *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000), this Court explained that the agency's viewpoint prevails in cases of statutory ambiguity and set forth a road map as to how to determine such issues:

> But if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible. Such deference is justified because the responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones, and because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated.

The opinion continued:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context. Ambiguity is a creature not of definitional possibilities but of statutory context. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole.

The Ninth Circuit followed these instructions to the letter. First, in a section of the opinion headed "Plain

Meaning and Structural Issues – The Competing Interpretations," beginning at page 135, the opinion carefully analyzed the key statutory term "not stringent enough to implement . . . water quality standard[s]" as used in Clean Water Act §303(d)(1)(A), which is at the heart of the controversy. It set out the conflicting interpretations of that language, as offered by Petitioners and by EPA. In footnote 14 and the accompanying text, the Court compared various ways the term "stringent" could be used, noting the somewhat conflicting dictionary definitions for the word in question, and acknowledged that the definition advanced by both sides had some plausibility. But it determined that EPA's interpretation was better supported by linguistic considerations. As this Court noted in *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418 (1992), "The existence of alternative dictionary definitions of the word 'required,' each making some sense under the statute, itself indicates that the statute is open to interpretation."

The very silence of the Clean Water Act on the precise question at issue here supports the inference that the statute is ambiguous: "Although the statute . . . gives direction not only by stating a general policy . . . but also by determining some specifics of the policy . . . , the statute is ambiguous nonetheless in that the agency must use its discretion to determine how best to implement the policy in those cases not covered by the statute's specific terms." *U.S. v. Haggar Apparel Co.*, 526 U.S. 380, 381 (1999). See also *Regions Hosp. v. Shalala*, 522 U.S. 448, 449 (1998).

In the present case,

> There is obviously some ambiguity in a term like "[not stringent enough to implement . . . water

> quality standards]" which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling any gap left, implicitly or explicitly, by Congress, the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) (citations and internal quotations omitted).

The situation in this case is analogous to that described by this Court in *National Federation of Federal Employees, Local 1309 v. Department of Interior*, 526 U.S. 86, 95 (1999):

> The Statute does not indicate that Congress itself decided to make these specific policy judgments. Hence the Agency's policy arguments illustrate the need for the Authority's elaboration or refinement of the basic statutory [requirement] . . . ; they illustrate the appropriateness of judicial deference to considered [Agency] views on the matter; and, most importantly, they do not narrow the scope of a statutory provision the language of which is consistent with a variety of interpretations.

The law with respect to agency interpretation of complex environmental statutes can best be summarized by this Court's statement with respect to the crucial definition of "take" under the Endangered Species Act:

> We need not decide whether the statutory definition of "take" compels the Secretary's interpretation of "harm," because our conclusions that

> Congress did not unambiguously manifest its intent to adopt respondents' view and that the Secretary's interpretation is reasonable suffice to decide this case. [Citing *Chevron*]. The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703 (1995).

Elaborating on this theme, this Court stated in *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 233 (1986), . . . [I]f a statute is silent or ambiguous with respect to the question at issue, our longstanding practice is to defer to the executive department's construction of a statutory scheme it is entrusted to administer, unless the legislative history of the enactment shows with sufficient clarity that the agency construction is contrary to the will of Congress." (Citations and internal punctuation omitted).

After parsing the etymology and meaning of the language of Section 303(d), the Ninth Circuit opinion turned to the question of legislative intent. It conducted a detailed examination of the statutory scheme to determine whether Petitioners were correct in asserting that the Clean Water Act did not contemplate TMDLs for nonpoint sources. The Court pointed out that:

> Point sources are treated differently from nonpoint sources for many purposes under the statute, but not all. In particular, there is no such distinction with regard to the basic purpose for which the § 303(d) list and TMDLs are compiled, the eventual attainment of state-defined water quality standards. *Id.* at 1137.

The Ninth Circuit correctly noted that the existence of certain planning and reporting mechanisms under §§208 and 319 of the Clean Water Act that apply only to nonpoint sources does *not* mean that such sources should not be regulated under the TMDL provision of §303. *Id.* at 1138-39. Thus, the court of Appeals concluded, *Chevron* deference is appropriate.

Even if EPA's regulations are not entitled to absolute deference afforded to an agency's interpretation of an ambiguous statute, they are still entitled to significant respect by the courts. As the *Chevron* opinion pointed out:

> But whether or not they enjoy any express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered. The well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance, and we have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . . *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984). (Citations and internal punctuation omitted).

III. PETITIONERS' POLICY ARGUMENTS ARE BADLY FLAWED AND SHOULD NOT BE ACCEPTED BY THIS COURT

Petitioners' policy arguments are inherently self-contradictory. They assert (Petition, p. 27) that TMDLs

should not be applied to half the impaired waters in the country, claiming (pp. 21-24) that the task of cleaning up waters impaired solely by nonpoint sources should be left entirely to the States, even though they acknowledge that the States don't have the money to do the job (p. 27). The practical effect of their contention would be that there would be no movement to clean up 43% of the polluted waters in America (Petition, p. 27 note 11).

This is certainly not what Congress intended. The Legislature passed the sweeping 1972 Clean Water Act amendments precisely because the previous policy of leaving the issue to the States had resulted in a totally ineffective clean-up program. 1972 U.S.C.C.A.N. 3668, 3675. Those amendments established "a comprehensive program for controlling and abating water pollution." *Train v. City of New York*, 420 U.S. 35, 37 (1975). "[T]he overall intention of Congress in enactment of the Federal Water Pollution Control Act was to eliminate or to reduce as much as possible all water pollution throughout the United States. *Quarles Petroleum Co., Inc. v. U.S.*, 551 F.2d 1201, 1206 (Ct. Claims 1977). Furthermore, "It is the intent of the Clean Water Act to cover, as much as possible, all waters of the United States instead of just some." *Quivira Min. Co. v. U.S.E.P.A.*, 765 F.2d 126, 129 (10th Cir. 1985). Congress did not intend that pollution from nonpoint sources be ignored. Rather, the Clean Water Act states explicitly: "It is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution." 33 U.S.C. §1251(a)(7). Allowing nonpoint sources to continue to pollute streams like the Garcia "would improperly

undermine the integrity of [the CWA's] prohibitions." *Northern Plains Resource Council v. Fidelity Exploration and Dev. Co.* ___ F.3d ___, ___ (9th Cir. No. 02-35836, April 10, 2003).

Contrary to Petitioners' assertion, the TMDL program does not constitute an intrusive intervention into the States' traditional realm. The State of California eagerly supported EPA's position throughout the litigation, participating substantially in the proceedings before the District Court and filing an *amicus* brief in the Court of Appeals. The latter brief was joined by six other states, including Washington and Oregon, both of which have substantial timber operations. Not a single State has indicated support for Petitioners' position.

The seven *amici* States pointed out that, far from meddling in their affairs, the federal TMDL program:

> provides the necessary information so that state regulatory agencies can impose appropriate best management practices on land owners, based on applicable state law. . . . Thus, the federal government's TMDL program provides the information so that States can make informed water quality decisions, but does not usurp that decision-making power. By empowering States, this process actually enhances state and local control. Brief of *Amici Curiae*, p. 20.

As required by Supreme Court Rule 15.2, PCFFA must point out that Petitioners have seriously misstated the practical import of the decision. They claim (Petition, p. 5) that the EPA TMDL imposed a "dramatic" impact on landowners and that the Pronsolinos and a neighbor were forced to endure "onerous new obligations to satisfy EPA's TMDL" which added millions of dollars to the cost of their

timber operations. But, in fact, those expenses were not caused by *EPA's* demands but, rather, were incurred in order to comply with permit requirements imposed by the State of California. As the Ninth Circuit opinion noted, the restrictions about which Petitioners complain were all imposed as conditions of a permit issued by the California Department of Forestry. See *Pronsolino v. Nastri*, 291 F.3d 1123, 1129-30 and note 6 (9th Cir. 2002).

Indeed, a high-ranking official of the Department of Forestry indicated that the contents of those permits were not influenced, at all, by the EPA TMDL process. Deposition of Thomas Osipowich 89:2-6. That official acknowledged that the EPA TMDL does not require any individual landowner to do any particular thing. *Id.* 93:5-14. See also Lundborg Deposition 90:22-91:1; 93:9-94:5; 105:5-8; 118:1-4. An official of the State agency responsible for water quality, including TMDLs, the North Coast Regional Water Quality Control Board, testified that the existence or non-existence of the federal TMDL would have made no difference as to how her agency reviewed the Pronsolinos' timber harvest plan. Lundborg Deposition 96:5-17.

Thus, the federal TMDL is not self-enforcing and contains no requirements that landowners take any specific action. Ms. Lundborg testified that the federal TMDL, lacking an enforcement or monitoring mechanism, is not, by itself, an effective regulatory tool. Lundborg Deposition 118:8-22. In short, the record indicates that EPA's TMDL has not cost the Petitioners (or anyone else) one cent.

Rather, the federal TMDL program serves only as an information gathering tool. But that tool is an extremely important one. For example, the federal TMDL program

allowed for the funding of between 5 and 10 positions in the North Coast Regional Water Quality Control Board to deal with impacts to impaired rivers. Lundborg Deposition 83:8-21. And the federal TMDL generated an outreach program that enabled landowners in the Garcia River drainage to achieve best management practices. Lundborg Deposition 91:2-13. See also Brief of *Amici Curiae*, p. 20.

IV. CONCLUSION

In conclusion, this is not a proper case for review by this Court. Petitioners concede (Petition, p. 25) there is no conflict among the Circuits on this issue. The case does not establish new law, since the Ninth Circuit has already held that TMDLs are appropriate for streams where effluent limitations do not apply. See *Dioxin/Organochlorine Center v. Clarke*, 57 F.3d 1517, 1526-27 (9th Cir.1995). As shown above, the Court of Appeals' statutory analysis comports with the requirements laid out in the *Chevron* case. The position espoused by the *amici* debunks the notion that EPA's TMDL program is a threat to federalism. And that program does not inflict ruinous expense on landowners, since it is not self-enforcing and does not impose any mandatory requirements on anyone. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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